

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:)	
)	
Miller Grain Company, Inc.,)	Case No. 02-41324-7
)	
Debtor.)	
_____)	

MEMORANDUM AND ORDER

This matter is before the Court on the Trustee's Motion for Allowance of Attorney Fees (Doc. 364) and the Statement of Trustee's Special Counsel's Fees (Doc. 365). The Trustee is seeking an order awarding attorney fees for the Trustee and her Special Counsel relating to Victor Nelson's motion seeking a stay of sanctions entered against him by this Court. The Trustee is also asking that the attorney fees be assessed against Mr. Nelson, individually, and not the bankruptcy estate. The Court has reviewed the pleadings filed in this matter and is now prepared to rule. The Court has jurisdiction to hear this matter.¹

I. FACTUAL BACKGROUND

On May 28, 2003, now retired Judge Pusateri entered an order finding Victor Nelson (Nelson) in civil contempt for failure to comply with certain court orders. That order required him to file a fee application, to disgorge certain fees paid to him, to pay certain attorney fees of the Trustee and her Special Counsel, and it barred him from practicing law in the United States Bankruptcy Court for the District of Kansas until he had fulfilled those obligations. The genesis of this order was, among other matters, Nelson's failure to appear on September 24, 2002 for a hearing on the Court's Order to Show Cause against Debtors, Donald and Shirley Sundgren and Victor Nelson for Contempt for Failure to Comply with

¹ This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

Court's Order Requiring Filing of Schedules and Statement of Financial Affairs. Nelson later testified that he appeared for that hearing 45 minutes late, and that he chose not to come in to the courtroom because he thought the hearing had concluded. He thereafter did not notify the court of his late appearance or make any attempt to have the matter re-heard that day. Nelson timely appealed the May 28, 2003 Order, and that appeal is pending before the Honorable Sam Crow, United States District Judge, in Case No. 03-4135.

On August 26, 2003, almost three months after he was first barred from practicing in the Kansas bankruptcy courts, Nelson filed a Motion for a Stay of the Court's order during the appeal. On September 17, 2003, this Court set that matter for an evidentiary hearing, which was held October 1, 2003. The Court was ready to commence the evidentiary hearing on Nelson's Motion for Stay at 9:00 a.m. on October 1, but he did not appear. Because of the seriousness of the matter, to-wit: Nelson's ability to practice law in the bankruptcy courts pending the disposition of his appeal, this judge, the court reporter, the clerk, the Trustee and her counsel all waited. Ultimately, at 9:49 a.m., Nelson appeared and apologized for not allowing enough time for the drive between Wichita and Topeka. This is the very excuse he gave Judge Pusateri for arriving 45 minutes late on September 24, 2002, also a trip from Wichita.

On October 17, 2003, the Court granted Nelson's motion for stay, but imposed numerous requirements and conditions that Nelson was required to meet in order for the stay to remain in place. In recognizing that all the issues surrounding the sanctions imposed by Judge Pusateri and the subsequent attempts by Nelson to stay enforcement of those sanctions pending appeal were directly and solely caused by Nelson's inappropriate actions in this case, the Court also ordered the Trustee and her Special Counsel to submit an application for those fees associated with the motion for stay to the Court for consideration

as to whether they should be assessed against Nelson, rather than being placed upon the creditors of the estate.

Pursuant to the Court's order, the Trustee submitted a fee statement wherein she seeks attorney fees for 3.5 hours on October 1, 2003 (for attending the evidentiary hearing), 0.45 hours on October 8, 2003 (for attending a hearing via conference call with the Court) and 0.60 hours on October 17, 2003 (for attending a hearing via conference call with the Court wherein the Court announced its ruling on the motion for stay). The Trustee is seeking reimbursement at the rate of \$150.00 per hour for 4.55 hours, or \$682.50.

The Trustee's Special Counsel has also submitted a fee statement wherein she seeks attorney fees for 4.10 hours on October 1, 2003, 0.40 hours on October 8, 2003 and .60 hours on October 17, 2003. The Special Counsel is seeking reimbursement for the October 1 hearing at the rate of \$245.00 per hour and for the October 8 and October 17 conference calls at the rate of \$180.00 per hour, for a total of \$1,184.50.²

Victor Nelson has filed an objection to the fee applications, contending that the fees charged are unreasonable, that the Trustee and her Special Counsel are not entitled to reimbursement for the fees because their work did not benefit the estate, and that even if the fees should be awarded to the Trustee and her Special Counsel, they cannot be assessed against him.

²Trustee's Special Counsel does not indicate the reason for the decrease in her hourly rate, but the Court does note that at the time she appeared at the October 1, 2003 hearing, she was a member of the Kansas City firm of Stinson, Morrison Hecker LLP, and that on October 8 and 17, at the time of the hearings, she had recently associated with a different firm located in Topeka, Kansas, Wright Henson Clark & Baker LLP.

II. ANALYSIS

There are three issues that have been raised in regard to this application for attorney fees. First, Nelson contends that the Trustee and her Special Counsel are not entitled to recover any attorney fees because they were not acting to benefit the bankruptcy estate in opposing the motion to stay the order that barred Nelson from practicing before this Court. Next, Nelson contends that the fee applications that have been submitted are excessive. Finally, Nelson contends that he should not be responsible for paying the attorney fees associated with challenging the motion for stay, because he was the prevailing party.

A. The Trustee's Special Counsel is entitled to an award of attorney fees relating to her defense of the motion for stay filed by Nelson.

Nelson contends that the Trustee and her Special Counsel are not entitled to an award of attorney fees in this case because their work was not done for the benefit of the bankruptcy estate. According to Nelson, the Trustee and her Special Counsel cannot be awarded attorney fees for services that do not benefit the bankruptcy estate. The Court disagrees.

The Bankruptcy Code states that the court shall not allow compensation for unnecessary duplication of services, or services that were not reasonably likely to benefit the debtor's estate **or** necessary to the administration of the case.³ Although the services provided by the Trustee's Special Counsel may not have directly benefitted the bankruptcy estate, they were necessary to the administration of the case. The Trustee's Special Counsel played an extremely important role in the administration and prosecution of this case. Therefore, the services are compensable under § 330.

³11 U.S.C. § 330(a)(4)(A). Unless otherwise noted, all future statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq.

B. The fee requests submitted by the Trustee and her Special Counsel are duplicative and will be reduced.

The Court finds that the fee requests submitted by the Trustee and her Special Counsel relating to opposing the motion for stay are, together, excessive, and will be reduced. The Trustee and her Special Counsel have both submitted bills for taking part in the evidentiary hearing on October 1, as well as the two conference calls of October 8 and October 17. Although the Court does not question the amount of time claimed on those bills or the fact that each attorney's hourly rates are reasonable⁴ in connection with this case, the Court does not believe that having two billing attorneys participating in these hearings was necessary. As noted above, § 330(a)(4)(A)(I) states that the court shall not allow compensation for "unnecessary duplication of services."

The hearings in connection with the motion for stay in this case were not of the type in which two billing attorneys were necessary. Because of their familiarity with this case, and their overall competence, either the Trustee or her Special Counsel could have handled all aspects of these hearings. The Court certainly understands the Trustee's desire to be present while her Special Counsel represented her at the hearings, but the Court finds that the Trustee's role was that of a client, rather than co-counsel. This is

⁴Nelson claims that the hourly rates charged by the Trustee's Special Counsel are excessive for the services in a Chapter 7 of this nature. The Court disagrees. First, the Court takes notice of the fact that at the time of the October 1, 2003 hearing Ms. Hamilton was a member of a large Kansas City law firm and that her hourly rate can and does reflect that market. In addition, although the particular motion for stay may not have been of the type that would warrant an attorney charging \$245 per hour, although it was a unique hearing, the underlying bankruptcy case has been very complicated and warrants the retention of a highly qualified attorney. The Court is not going to require the Special Counsel to vary her hourly rate depending on the particular type of work being done at any given time in the case, although to the extent simpler legal issues can be delegated to attorneys in her firm with a lower billable rate, that is always encouraged. The amount of the rate is reasonable in this case, and it will be accepted by the Court.

especially true for the time spent in the conference call with the Court wherein the Court merely read its ruling in to the record on Nelson's stay motion. Because only one attorney was necessary to represent the estate at these hearings, the Court will not grant the Trustee's request for fees, but will grant the fees sought by the Trustee's Special Counsel, in the amount of \$1,184.50. For the reasons set forth below, Nelson shall be required to pay \$200.08 of this attorney fee award.

C. Nelson is not responsible for the payment of the majority of the attorney fees relating to the Trustee's opposition to his motion for stay.

Courts in this country typically follow what has become known as the "American Rule," which is that the prevailing party is not entitled to collect attorney fees from the losing party.⁵ The Tenth Circuit has recognized a "narrow exception" to this rule, which allows a trial court to award attorney fees when a party's opponent acts "in bad faith, vexatiously, wantonly, or for oppressive reasons."⁶ In order to justify the shifting of fees, the Tenth Circuit "requires more than merely a finding that a claim was frivolous when brought. . . . [T]he bad faith exception is drawn very narrowly and may be resorted to 'only in exceptional cases and for dominating reasons of justice.'"⁷

The Court finds that Nelson's actions in seeking a stay of the proceedings were not brought in bad faith. The fact that he was successful in obtaining the stay, albeit with numerous restrictions and requirements proposed by the Trustee and the Court, further supports his claim that he should not be

⁵*U.S. v. McCall*, 235 F.3d 1211, 1216 (10th Cir. 2000) (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983)).

⁶*Id.* (citing *Sterling Energy Ltd. v. Friendly Nat'l Bank*, 744 F.2d 1433, 1435 (10th Cir. 1984)).

⁷*Sterling Energy Ltd. v. Friendly Nat'l Bank*, 744 F.2d 1433, 1437 (10th Cir. 1984) (quoting *Cornwall v. Robinson*, 654 F.2d 685, 687 (10th Cir. 1981)).

responsible for the attorney fees incurred by the Trustee in defending the motion for a stay. The Court is admittedly troubled by the fact that were it not for Nelson's repeated refusals to follow Court orders, none of these proceedings would have even been necessary. Nelson is clearly at fault for the Trustee's need to incur the attorney fees that are at issue in this case. However, Nelson's actions in moving for a stay do not fall within the very narrow restriction enumerated by the Tenth Circuit Court of Appeals for allowing fee shifting.

The Court will, however, assess a portion of the fees incurred by the Trustee's Special Counsel at the hearing held on October 1, 2003 to Nelson. The evidentiary hearing for that date was scheduled to begin at 9:00 a.m. The Trustee, along with her Special Counsel, the clerk of the court, this judge, and the court reporter were all ready to proceed at 9:00 a.m., but Nelson failed to appear until 9:49 a.m. Nelson's only excuse for arriving nearly one hour late at this evidentiary hearing was that he did not leave himself enough time to travel from Wichita to Topeka. The Court notes that this is the exact excuse Nelson gave to Judge Pusateri for being late at the September 2002 hearing. Nelson provided no evidence that the delay was not of his own making, nor did Nelson call court chambers or opposing counsel as he left Wichita to warn of his late departure. The Court has no doubt that Nelson is familiar with the amount of time it takes to travel between Wichita and Topeka. The Court finds that Nelson should, and will, be responsible for the time wasted by the Trustee's Special Counsel as she waited for Nelson to appear at this hearing. This finding is not based upon a fee shifting request by the Trustee, but rather as a sanction by the Court for Nelson's actions. The Trustee's Special Counsel, whose hourly rate at the time of the hearing was \$245 per hour, lost \$200.08 in time as a result of Nelson's tardiness. Therefore, the Court orders that Nelson reimburse the estate for the time lost by his failure to timely appear at the hearing in this

matter in the amount of \$200.08. Again, although Nelson's tardiness also wasted the Trustee's time, because the Court has held that her appearance was duplicative, the Court does not require Nelson to similarly reimburse her lost time.

IT IS, THEREFORE, BY THIS COURT ORDERED that the Trustee's Motion for Allowance of Attorney Fees (Doc. 364) is denied, and the Statement of Trustee's Special Counsel's Fees (Doc. 365) is granted. The Court grants fees to Trustee's Special Counsel in the amount of \$1,184.50, all of which shall be paid from the estate.

IT IS FURTHER ORDERED that Victor Nelson is required to reimburse the estate \$200.08 of that \$1,184.50 fee award. Mr. Nelson shall reimburse the estate within the next thirty (30) days.

IT IS SO ORDERED THIS _____ day of April, 2004.

JANICE MILLER KARLIN
United States Bankruptcy Judge
District of Kansas

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the Memorandum and Order was deposited in the United States mail, postage prepaid on this 2nd day of April, 2004, to the following:

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